Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From October 1, 1956
Through December 31, 1956

VOLUME 85

JOHN PATTERSON, Attorney General

OUTLOOK PUBLISHING CO., Inc.
Printers and Publishers
Alexander City, Ala.
1957

QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

October 1, 1956

Through December 31, 1956

Volume No. 85

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1956, through December 31, 1956, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

JOSEPH G. ROBERTSON
Confidential Assistant

Assistant Attorneys General

MacDonald Gallion
Senior Assistant

James Noel Baker
Robert P. Bradley
Owen Bridges
Paul T. Gish, Jr.
Robert G. Kilgore, Jr.
Mary A. Lee
Gordon Madison
William N. McQueen
George Mentz
Edmon L. Rinehart
James L. Screws
Bernard F. Sykes
James W. Webb
George Young

Assistant Attorney General Assigned to the Department of Agriculture and Industries:

George O. Miller, Jr.

Assistant Attorneys General Assigned to the Department of Conservation:

A. J. Harris
William T. Edwards, Jr.
William G. O'Rear

Assistant Attorney General Assigned to the Department of Examiners and Public Accounts:

James T. Hardin

Assistant Attorney General Assigned to the Department of Finance:

Randolph G. Lurie

Assistant Attorney General Assigned to the Department of Welfare:

Mary A. Lee

Assistant Attorneys General Assigned to the Department of Revenue:

Willard W. Livingston
H. Grady Tiller
William H. Burton, Jr.
James R. Payne
Arthur Joe Grant

OPINIONS

October 9, 1956

Hon. J. A. Logue, Chairman
Board of Revenue
Houston County
Dothan, Alabama

Counties—Elections—Voters—Opinions Overruled, Modified and Distinguished.

1. County governing bodies are authorized to change the boundaries of election precincts or districts.

2. Changes in election precincts, districts, and voting places must be made more than three months before an election.

3. The number of qualified electors who reside within an election precinct or district is not limited.

4. County governing bodies must separate the qualified electors in each election precinct or district into groups in alphabetical order of the proper number as provided by Act. No. 141, First Special Session, 1956, approved February 24, 1956, and provide voting places for each group in each precinct or district.

5. A municipality with a commission form of government need not be divided into election wards.

6. Quarterly Report of Attorney General, Vol. 59, page 78, modified.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of September 15, 1956, is as follows:

"According to the original organization of Houston County, Alabama, beat three included the City of Dothan, Alabama, and was formed in such a manner as to extend several miles north of the city. Recently, by an act of the legislature, the city limits of Dothan were extended and as a result of this extension, the city limits overlapped into beats two, four, seven, and nine.

"The Board of Revenue is interested in changing the beat lines of these beats, so that all persons who live in the city limits of Dothan, Alabama, will be included on the list of qualified electors of beat three and will vote in beat three. It is felt that this rearranging of the beat lines would be a convenience for the voters and also assist the Probate Judge in preparing a list of qualified electors in each of the beats of Houston County, Alabama, as provided by Code of Alabama, Title 17, Sections 38 and 40.

"We are familiar with the Code of 1940, Title 17, Section 77, which provides that the Court of County Commissioners or the Board of Revenue may change election precincts and districts, but this section apparently is restricted and dependant upon the number of legal voters in each

district; and we are also familiar with Attorney General Biennial Report 1934-1936, page 331, which reads as follows: 'It is my opinion that these statutes (Code of 1940, Title 17, Article 6, Sections 77, 78, 79, 80, and 81) authorize the Court of County Commissioners to readjust the boundaries of election precincts, not at will, or capriciously, but in a manner having reasonable relation to the requirement of the statute.'

"We do not wish to divide any of the beats now existing in Houston County, Alabama, we merely would like to rearrange these beat lines, so as to make the new city limits of Dothan, Alabama, the boundaries of beat three, and in order to do this, the statutes pertaining to the number of legal voters in each district will not apply.

"Please advise me if in your opinion the County Board of Revenue has the authority to rearrange the boundary of the beats in Houston County, Alabama, or if it should be done by an act of the legislature."

Title 17, Sections 77, 80, 81, 84 and 89, Code of Alabama 1940, were amended, and Title 17, Section 79, Code of Alabama 1940, was repealed by Act No. 141, First Special Session 1956, approved February 24, 1956.

By virtue of Act No. 141, supra, the county governing body is authorized to change the boundaries of an election precinct or district. The number of qualified electors who may reside within an election precinct or district is not limited. However, if more than three hundred qualified electors reside within such precinct or district where paper ballots are used, or if more than six hundred qualified electors reside within such precinct or district where voting machines are used, the county governing body may either divide the precinct or district into smaller ones containing the proper number of qualified electors or separate the qualified electors in the precinct or district into groups in alphabetical order of the proper number, and provide a voting place for each group in such precinct or district.

Act No. 655, General Acts 1947, page 504, provides that election precincts, districts, and voting places shall not be changed within three months before an election.

Therefore, I am of the opinion that the Board of Revenue of Houston County is authorized to change the boundaries of the election precincts in your county at any time more than three months before an election, so that the boundary of Beat 3 will correspond with the corporate limits of the City of Dothan. When the boundaries of such precincts are changed, the Board of Revenue must separate the qualified electors in each precinct into groups in alphabetical order of the proper number in accordance with Act. No. 141, supra, and provide a voting place for each group in each precinct.

It should be pointed out that there is much confusion under the law that exists today as to whose duty it is to change, establish or subdivide election wards within the boundaries of the municipality. The provisions of Title 17, Chapter 1, Article 6, Code of Alabama 1940, along with Act No. 141, supra, would place the duty upon the county governing body because of Section 78 of said Article 6, which provides, "Wherever the word 'precinct' is used in this chapter, it shall include ward or wards in any incorporated towns and cities." On the other hand, the provisions of Title 37, Sections

7, 169, 170 and 171, Code of Alabama 1940, would seem to place the duty upon the municipal governing body. See Quarterly Report of Attorney General, Vol. 37, page 21.

A municipality establishes wards in order to divide itself into territories from which members of the municipal council are elected. The City of Dothan is governed by a city commission and has no municipal council. The general laws of this State which relate particularly to municipalities with commission forms of government are codified in Title 37, Chapter 4, Code of Alabama 1940. None of the statutes found in said Chapter 4 require that municipalities be divided into wards. Therefore, I am of the opinion that the City of Dothan need not be divided into wards.

Thus, the confusion under the law as to whose duty it is to change, establish, or subdivide election wards within municipalities does not affect the problem presented by your request.

The opinion reported in Quarterly Report of Attorney General, Vol. 59, page 78, is hereby modified to conform to the opinion expressed herein.

Yours very truly,

JOHN PATTERSON
Attorney General

October 22, 1956

Hon. J. H. Dobbins
Clerk & Register
Circuit Court
Calhoun County
Anniston, Alabama

Military and Naval Affairs—Absentee Ballots.

1. A civilian working with the Armed Forces of the United States is not entitled to cast an absentee ballot by mail.

2. Members of the Merchant Marine are not members of the Armed Forces of the United States.

3. A member of the National Guard on extended active duty with the Armed Forces of the United States is entitled to cast an absentee ballot by mail.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of October 5, 1956, is as follows:

"Subject: Absentee Ballot.

"I would be pleased to have an official opinion on the following question.

"1. John Doe is a civilian inside or outside of the United States officially attached to and serving with the Armed Forces of the

United States. Can I accept his application to vote an absentee ballot in Alabama and mail him (or her) a ballot, notwithstanding the fact the application is certified by either a commissioned or Warrant officer, non commissioned officer not below rank of Sergeant, Petty officer, or other person authorized to administer and attest the applicant's oath?

"2. Sam Doe is in the Merchant Marine of the United States. Can I accept his application to vote an absentee ballot in Alabama and mail him a ballot, notwithstanding the fact the application is certified by either a commissioned or Warrant officer, non commissioned officer not below rank of Sergeant, Petty officer, or other person authorized to administer and attest the applicant's oath?

"3. Bill Doe is in the National Guard on active duty with the Armed forces of the United States. Can I accept his absentee ballot in Alabama and mail him a ballot, notwithstanding the fact the application is certified by either a commissioned or Warrant officer, non commissioned officer not below rank of Sergeant, Petty Officer, or other person authorized to administer and attest the applicant's oath?

"Excerpts from Act No. 424, 1949 as amended by Act 4, Fourth Special Session, 1956: that any prospective absentee voter meeting the requirements of Section 2 **who is a member of the Armed Forces of the United States of America** . . . may make application for an absentee ballot not more than 40 nor less than 5 days prior to the election. . . . If the applicant is a member of the Armed Forces his application shall have attached a certificate signed by his **commanding officer.** . .

"I have had several applications which make it necessary for this opinion."

Before proceeding to a categorical answer to your questions, I deem it advisable to quote pertinent parts of Act No. 99, General and Local Acts (Special Sessions) 1956, page 420, which are as follows:

". . . . Any prospective absentee voter meeting the requirements of Section 2 who is a member of the Armed Forces of the United State of America, or the wife of any such person, if she meets the requirements of said section, may, not more than forty-five nor less than five days prior to the election at which he or she desires to vote, make application for an absentee ballot, as herein provided to be made by a prospective voter in person, by filling out the Federal postcard application form, authorized and provided for under the provisions of 'The Federal Voting Assistance Act of 1955' (Public Law 296, Chapter 656, H. R. 4048, approved August 9, 1955, 84th Congress, 1st Session), and mailing such application to the register, or to the person designated to serve instead of the register. The affidavit herein provided to be attached to the absentee ballot shall be executed by the prospective voter in person before such commanding

officer or authority in charge who shall certify to such fact. Such ballot shall be returned by United States mail to the register or to the person acting in his stead and shall be by him marked the day and hour of the receipt thereof. When received by the register or person acting in his stead, the ballot shall be handled and counted in the same manner as ballots voted before the register in person."

Only members of the Armed Forces of the United States, or their wives, insofar as the answer to your question is concerned, may cast absentee ballots by mail.

My answer to your first question is in the negative. It appears from the facts stated by you that the person here considered is a civilian and is not a member of the Armed Forces.

My answer to your second inquiry is in the negative. Members of the Merchant Marine are not considered as members of the Armed Forces of the United States of America within the meaning of Act No. 99, supra.

My answer to your third question is in the affirmative.

I am assuming that the National Guardsman here considered is on extended active duty with the Armed Forces of the United States and is not merely participating in weekly drills or summer camps with the National Guard.

Based upon this assumption, a National Guardsman, who is on extended active duty with the Armed Forces of the United States, is a member of the Armed Forces of the United States within the purview of Act No. 99, supra, and may, therefore, cast an absentee ballot by mail as provided in said act.

Yours very truly,

JOHN PATTERSON
Attorney General

October 22, 1956

Hon. Robert C. Jones
Tax Assessor, Wilcox County
Camden, Alabama

Ad Valorem Taxes—Motor Vehicles—Taxation.

1. The books of the tax assessor must remain open until and including the last Monday in February.

2. Motor vehicles brought into this State after October 1 and on or before the last Monday in the following February of each year are subject to assessment for ad valorem taxation the following October 1.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of October 4, 1956, is as follows:

"Relative to our long distance telephone conversation on October 3, and the opinion you sent to me the same date, I would like to request an opinion on the following:

"On the third Monday in February, 1955, the tax assessor officially completed his assessments.

"I took over as Tax Assessor on October 1, 1955, with the understanding that his assessments were completed on the third Monday in February.

"The code states as follows;

Section 704, Title 51

" 'Motor vehicles brought into this state after the first day of October and before the tax assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the state on the first day of October.'

Section 57, Title 51

" 'The Tax Assessor is required to complete his assessment not later than the last Monday in February of each year.'

"Now the question involved is: Must the Tax Assessor wait until the last Monday in February to close his books?

"I had to pay the taxes on all cars sold during that week as per my 1955-56 audit, and feel that I should get that money back.

"I also informed the local automobile dealers that I completed my 1956 assessments on the third Monday in February.

"Please inform me also if I may exempt the cars bought during the week of February 20-27, 1956, and if I may claim refund on the taxes paid on cars bought after the third Tuesday and before the fourth Monday in February, 1955."

It is my opinion that the books of the tax assessor must remain open until and including the last Monday in February, and that motor vehicles brought into this State after the first day of October and on or before the last Monday in the following February of each year are subject to ad valorem taxation. The ad valorem taxes on such motor vehicles are not due until the following October 1 at the time when the vehicles are assessed and the license tags purchased therefor. Title 51, Section 57, Code of Alabama 1940; Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504.

In an opinion released by this office on November 10, 1955, to Honorable C. R. Lawson, Tax Assessor, Hale County, (Quarterly Report of Attorney General, Vol. 81, page 35), it is stated:

"Before paying his license tax referred to above, Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, requires the payment in the county of his residence ad valorem tax for the 'preceding year.' Section 704, as amended, supra, provides

in subsection (c) thereof that 'motor vehicles brought into this state after the first day of October and before the tax assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the state on the first day of October.' Therefore, if an automobile was in the State of Alabama on October 1, 1954, or brought into Alabama before the tax assessor has completed his assessment (the last Monday in February, 1955—Title 51, Section 57, Code of Alabama 1940), there would normally be due and payable on October 1, 1955, ad valorem tax. Section 704, as amended, supra."

See opinion of this office dated December 15, 1955, to Honorable George A. Toulmin, Commissioner of Licenses, Mobile County. (Quarterly Report of Attorney General, Vol. 81, page 73.)

Your attention is also called to an opinion reported in Quarterly Report of Attorney General, Vol. 20, page 252, wherein it was held that motor vehicles in the State on October 1, 1939, or brought into the State on or before the last Monday in February, 1940, are subject to assessment and payment of ad valorem taxes when a license for the year 1940-41 is applied for. In so holding, the opinion states:

"It will, therefore, be seen that a motor vehicle which was in the State on October 1, 1939 or was brought into the State before the tax assessor was required to have completed his assessment, which under the provisions of Section 50, supra, was not later than the last Monday in February 1940, is subject to assessment and the payment of ad valorem taxes when applying for a license for the year 1940-41. This applies to both new and used motor vehicles. . . . "

The opinion reported in Vol. 20, supra, is hereby reaffirmed. In reaching the conclusion stated above, I am not unmindful of the provisions of Section 57, supra, which states that the tax assessor is required to complete his assessments "not later than the last Monday in February of each year." However, any conclusion other than that stated above would bring about discrimination with respect to motor vehicles brought into this State at the same time but into different counties where the books of the tax assessors were closed on different dates prior to the last Monday in February. Such, in my opinion, was not the intention of the Legislature, but rather it was, in my judgment, the intention to specify a certain period wherein motor vehicles brought into this State during such period would be subject to ad valorem taxation, the period being after October 1 and on or before the last Monday in the following February.

In addition to the statutory provisions referred to in your inquiry, your attention is called to Title 51, Section 21 (m), Code of Alabama 1940, which provides as follows:

"All property brought into the state after the first day of October and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the state on the first day of October."

For state and county ad valorem tax purposes, all property, other than motor vehicles, is assessed as of October 1 and the tax becomes due the

following October 1. Any such property brought into the State after October 1 and on or before the last Monday in the following February is subject to assessment for ad valorem tax as of October 1 for that tax year. **Proctor v. State,** 215 Ala. 6, 109 So. 105.

In view of the above, and with respect to any claim for refund of the taxes you paid on cars bought after the third Tuesday and before the last (fourth) Monday in February, 1955, it is my opinion that such claim should not be approved. It is also my opinion that you may not exempt from ad valorem tax the cars bought during the week of February 20-27, 1956.

Yours very truly,

JOHN PATTERSON
Attorney General

October 31, 1956

Hon. Ed E. Reid
Executive Director
Alabama League of Municipalities
24 South Hull Street
Montgomery, Alabama

Accountants and Accounting—Municipalities—Statutes.

1. The same person may audit the books and accounts of a municipality having a commission form of government for successive years.

2. The same auditor or the same firm of auditors may not audit the books and accounts of a municipality having a mayor-council form of government for successive years.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of October 5, 1956, is as follows:

"The mayor of one of our member-municipalities has raised a question regarding Section 445 of Title 37, Code of 1940. Specifically, he has inquired whether or not it would be lawful for a municipality to employ the same firm of auditors for successive years provided that the same individual accountant did not perform the actual examination of the municipal accounts for successive years.

"Section 445 of Title 37 requires that an annual audit be made of the records of a town or city and reads as follows:

" 'In cities and towns, the mayor shall at least once a year, appoint an expert accountant who shall make an examination in detail of all books and accounts of the city officials to cover the period since the preceding examination, and make a full report thereof in writing, under oath, to be submitted to the council at its first meeting after the completion of such report, and the same shall be spread upon the minutes of the

council, but the same person shall not be appointed or authorized to make such examinations twice in succession. For his services said accountant shall be paid such sum as may be agreed upon.' (Emphasis ours.)

"It is our opinion that it would be lawful to employ the same firm of auditors provided that the individual accountant making the examination was not the same for two successive years. However, this is an important responsibility of the mayor and he would be subject to much criticism in certain cases if he did not comply in the fullest extent with the law. For this reason, we felt it would be desirable to obtain an opinion from you.

"In support of our opinion on the matter, we would point out that the law states merely that the 'same person shall not be appointed or authorized to make such examinations twice in succession.' It does not clearly prohibit the same firm of auditors from making the examination twice in succession.

"In addition, we would point out that while an accountant may be an employee or a partner in a firm of accountants or auditors, he is licensed as an individual. When he completes his examination of the records of a municipality, he signs a personal oath that his report is accurate and complete. Finally, the making of an audit is an object process and there would be no conflict of interest in having members or employees of the same firm perform the task in successive years. In other words, it presents a different situation than when two members of a law firm represent opposing interests.

"In view of these facts, we feel that it would be proper and within the spirit of the law for a town or city to engage the same firm of auditors in successive years, provided that the same individual accountant did not make the examination twice in succession.

"We would also point out that such a practice would have very beneficial results for many municipalities. If the same firm of auditors could be employed on a somewhat permanent basis, they would have a real interest in helping municipal officials standardize and simplify their records and accounting procedures since this would reduce the time required for the audit. In addition, they would be inclined in many cases to work informally with municipal officials between audits in setting up new accounts and working out improved procedures as the need develops. These points have no bearing on the law involved, of course, but they do give weight to our request for your advice on this matter."

It should first be pointed out that the provisions of Title 37, Section 445, Code of Albaama 1940, apply only to those municipalities with a mayor-council form of government, and that a municipality with a commission form of government may employ the same person to audit its books or accounts for successive years. Quarterly Report of Attorney General, Vol. 56, page 70.

The problem presented by your request has not heretofore been decided by the appellate courts of this state, nor has said problem heretofore been presented to this office.

The fundamental rule in the construction of statutes, to which all other rules are subordinate, is that the intention of the Legislature should be ascertained, and, when ascertained, it is the law. Quarterly Report of Attorney General, Vol. 24, page 146.

It is my opinion that it was the intent of the Legislature under the provisions of Section 445, supra, that no person, firm, corporation, association or partnership should audit the books and accounts of a municipality with a mayor-council form of government two years in succession.

Premises considered, I am of the opinion that a municipality having a mayor-council form of government may not employ the same firm of auditors to audit its books and accounts for successive years.

Yours very truly,

JOHN PATTERSON
Attorney General

November 21, 1956

Hon. John D. Petree, Jr.
City Attorney
City of Jasper
Jasper, Alabama

Municipalities—Publication—Zoning.

A municipal zoning ordinance must be published in accordance with Title 37, Sections 773 and 778, Code of Alabama 1940, before its passage.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of October 10, 1956, is as follows:

"The City of Jasper, Alabama, has had a zoning ordinance since the year 1936. The Planning Commission of the City recently suggested to the Board of Commissioners that Jasper should modernize its zoning ordinance, and a suggested form of zoning ordinance was submitted to the Board of Commissioners for its consideration. The Board of Commissioners agrees that Jasper's present zoning ordinance is outmoded and desires to repeal its old ordinance and adopt the ordinance suggested by the Planning Commission. Section 773, Title 37, Code of Alabama, 1940, provides that no ordinance relating to zoning shall be passed until the proposed ordinance has been published for at least fifteen days in advance of its passage in a newspaper of general circulation within the municipality. Section 778, Title 37, also relates to the manner in which the proposed ordinance must be published prior to its adoption. The zoning ordinance which the City now proposes to adopt is a bound booklet consisting of charts, a map, and many pages. The cost of publishing this ordinance in compliance with the requirements of Sections 773 and 778, supra, will exceed $500.

"Title 37, Section 462, Code of Alabama 1940, as last amended, relates to publication and recording of ordinances and contains the following provisions:

"'. . . ; provided, however, that all ordinances establishing or providing for rules and regulations for the construction, erection or improvement of buildings, installation of plumbing or plumbing fixtures, the installation of electric wiring or lighting fixtures or other similar work, those pertaining to fire prevention, health and sanitation, milk and milk products, parks, airports, water and waterworks, or to city or town codes or codifications of ordinances, where such rules and regulations or provisions have been printed as a code in book or pamphlet form, may be adopted by reference thereto such code without further publication or posting thereof, provided, however, that before adopting any such rules and regulations which are so printed as a code in book or pamphlet form the governing body of such city or town shall hold a public hearing thereon which said public hearing shall be preceded by fifteen days' notice of the time, place and purpose of such hearing. Such notice shall be published once a week for two successive weeks in a newspaper of general circulation in the city or town, but if no such newspaper is published within such city or town by posting notices thereof as hereinabove provided; that not less than three copies of such code shall be filed for not less than fifteen days prior to the adoption or passage of such ordinances, for use and examination by the public, in the office of the city or town clerk of such city or town prior to the adoption thereof.'

"The Board of Commissioners of the City of Jasper has requested that we obtain your opinion as to the following:

"1. In adopting the new zoning ordinance which repeals the present zoning ordinance, can the City meet the requirements of Sections 773 and 778 of Title 37 by publishing notice of the proposal to adopt the ordinance by reference, as provided in Section 462, supra, and thereby circumvent the provisions of Sections 773 and 778?

"2. Can a zoning ordinance of a municipality be adopted by reference as provided in Section 462, Title 37, 1940 Code of Alabama? If your answer is in the affirmative, would it be necessary, in view of the provisions of Section 462, Title 37, to first meet the requirements of Section 773 or Section 778 of Title 37 before adopting the ordinance by reference as provided by Section 462?

"3. Please outline the procedure whereby the City may adopt a new zoning ordinance whereby it may be unnecessary for the City before adopting the ordinance to publish the proposed ordinance in toto in a newspaper of general circulation in the City as required by Section 773, Title 37, Code of Alabama.

"Your furnishing the Board of Commissioners of the City your opinion with reference to the above questions will be appreciated."

Title 37, Section 773, Code of Alabama 1940, reads as follows:

"§ 773. Advertisement of ordinance providing for zones.—No ordinance shall be passed by any municipal corporation under the authority of this

article unless and until the proposed ordinance has been published for at least fifteen days in advance of its passage in a newspaper of general circulation within the municipality, or, if there is no newspaper, by posting the same in four conspicuous places within the municpality, together with a notice stating the time and place that the ordinance is to be considered by the municipal legislative authorities, and stating further that at such time and place all persons who desire shall have an opportunity of being heard in opposition to such ordinance."

Title 37, Section 778, Code of Alabama 1940, reads as follows:

"Method of procedure.—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed, and may adopt such ordinances as may be necessary to carry into effect and make effective the provisions of this article. No ordinance shall be passed by any municipal corporation under the authority of this article unless and until the proposed ordinance has been published at least once a week for two consecutive weeks in advance of its passage in a newspaper of general circulation within the municipality, or, if there is no newspaper, then by posting the same in four conspicuous places within the municipality, together with a notice stating the time and place that the ordinance is to be considered by the municipal legislative authorities, and stating further that at such time and place all persons who desire shall have an opportunity of being heard in opposition to or in favor of such ordinance. No such ordinance shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard."

Title 37, Section 462, Code of Alabama 1940, as amended by Act No. 405, General and Local Acts 1949, page 577, approved August 16, 1949, a portion of which is quoted in your request, provides that certain municipal ordinances may be adopted by reference without further publication of such ordinances. I am of the opinion that the provisions of this statute are not broad enough to apply to a zoning ordinance.

On January 12, 1950, the Supreme Court of Alabama, in the case of **Alabama Alcoholic Beverage Control Board, et al. v. City of Birmingham**, 253 Ala. 402, 44 So. 2d 593, held that a zoning ordinance was void because it had not been published as required by Sections 773 and 778, supra.

Premises considered, I am of the opinion that your zoning ordinance must be published in a newspaper of general circulation within your municipality once a week for two consecutive weeks and the first publication must appear at least fifteen days prior to the passage of such ordinance in accordance with Sections 773 and 778, supra.

Yours very truly,

JOHN PATTERSON
Attorney General

December 11, 1956

Honorable L. P. Dickson
Sheriff, Marshall County
Guntersville, Alabama

Solicitors—Warrants—Searches and Seizures—Prohibition.

1. A solicitor cannot take an affidavit and issue a search warrant thereon.

2. A search warrant, based upon probable cause may issue for the search of a private dwelling seeking prohibited liquors and beverages, after six o'clock, p.m., and before eight o'clock, a.m., provided said premises are open. Moreover, should the premises be closed, a search warrant may still issue for a search of the dwelling provided an affidavit is made by someone stating positively that prohibited liquors and beverages are in the dwelling.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of June 18, 1956, is as follows:

"Please find enclosed proposed form of affidavit to be made by me to the Solicitor in order to obtain a search warrant to be executed and served in the night time and, also, the proposed form for the search warrant.

"A majority of the defense attorneys in this county have expressed an opinion that any search in the night time is illegal. Therefore, I anticipate strenuous objection to the execution of the warrant and would appreciate your opinion as to the sufficiency of the enclosed affidavit and warrant.

"There are a number of people in this county who keep their supply of prohibited liquors hidden outside of their house in the day time and then bring it inside the house at night to sell it. I am sure they have been advised that they are safe from a search in the night time and I am very anxious to break up this type of bootlegging in this county."

As to the solicitor taking an affidavit and issuing a search warrant thereon, this office, in an opinion to Hon. Jack Livingston, County Solicitor, Centre, Alabama, on April 17, 1956, has held that a solicitor cannot take an affidavit and issue a search warrant thereon.

As to your question concerning whether or not a search warrant will issue for the purpose of searching a private dwelling for prohibited liquors and beverages in the nighttime, this office, in an opinion to the Hon. Charles Wright, Circuit Solicitor, 16th Judicial Circuit, Gadsden, Alabama, under date of August 16, 1955, held:

"Your questions concern an interpretation of Title 15, Section 107, and Title 29, Section 220, Code of Alabama 1940. These sections respectively provide as follows:

"'§107. When executed; magistrate must state time in warrant.—It must be executed in the daytime, unless the affidavits state positively that the property is on the person or in the place to be searched, in which case it may be executed at any time of the day or night; and the magistrate issuing it must state in the warrant, according to the character of the affidavits, whether it is to be executed by day, or at any time of the day or night.'

"'§220. Times when and places where warrant may be executed.—The warrant may be executed at any time between eight o'clock in the morning and six o'clock in the afternoon, or at any other time that the place or premises are open; but this article is not intended to secure the search of the premises of bona fide druggists who sell or keep for sale, alcohol only for medical, scientific or mechanical purposes, or wine for sacramental purposes as authorized by law, or of bona fide physicians who sell and keep for sale pure alcohol only for medical purposes at the places that may be allowed, and subject to the restrictions and regulations prescribed by law.'

"In answer to your inquiry numbered 1, it is my opinion that it cannot be said that Section 220, supra, supersedes Section 107, supra, insofar as the search and seizure of contraband liquors is concerned. Section 107, supra, has been applied to cases involving a search for contraband liquors. See **Lakey v. State**, 18 Ala. App. 442, 93 So. 51. In my opinion, an attempt should be made to give both statutes a field of operation, bearing in mind that statutes relating to searches must be strictly complied with.

"In answer to your question numbered 2, it is my opinion that if the search warrant is to be executed after six o'clock in the afternoon and before eight o'clock in the morning, and is issued for the purpose of searching for prohibited liquors or beverages, an affidavit showing probable cause would be sufficient for a search of premises that are open.

"Title 15, Section 107, Code of Alabama 1940, applies to the execution of search warrants in general. It appears that this section prohibits a search at night unless (1) the affidavit supporting the search warrant states positively that the property is at a certain location, and (2) the warrant must contain an authorization for execution at night.

"Section 220, supra, which applies particularly to searches for prohibited liquors restricts the time for searching between eight o'clock in the morning and six o'clock in the afternoon, or when the 'premises are open.' Under facts stated in your question numbered 2, it appears that the premises are open, but that the affidavit supporting the warrant shows probable cause and does not contain a statement positively to the effect that the property is at the designated place (as required for searches in the nighttime by Section 107, supra). In my opinion, Section

220, supra, was intended to authorize search for prohibited liquors at premises that were open in the nighttime or after six o'clock merely upon an affidavit showing probable cause and without a positive statement as required by Section 107, supra. See Biennial Report of Attorney General, 1934-36, page 559.

"In answer to your question numbered 3, it is my opinion that Section 220, supra, does prohibit the execution of a search warrant for contraband liquors in a private home after six o'clock in the afternoon when there is no evidence that the premises are open. Section 220, supra, does not authorize a search under a warrant for prohibited liquors between six o'clock in the afternoon and eight o'clock in the morning, unless the premises are open. You state in question numbered 3 that it was after six o'clock and that there is no evidence of the place being open. Under such circumstances, I am of the opinion that no search should be made on a warrant issued simply upon probable cause in such cases. It is further my opinion, however, that a search warrant could issue for the search of a private home for prohibited liquors after six o'clock or during the night, even though the private residence is not open, if affidavit is made under the provisions of Section 107, supra, stating positively that the liquor is at the place to be searched and if the warrant contains a statement or authorization that the warrant may be executed at night. Lakey v. State, supra.

"In answer to your question numbered 4, it is my view that Section 220, supra, authorizing the search of a place at a time when it is open, does not refer only to a public place of business, but may refer to a residence. By its terms the statute, Section 220, supra, does not exclude residences if such places can be said to be open. In my opinion, a residence that is open may be searched for prohibited liquors on a warrant based upon the affidavit merely showing probable cause. Of course, the evidence should be clear that the premises are open, because the courts have jealously guarded the rights of an individual in his own home.

"I do not feel that I could adequately define the condition under which a place is open. Obviously, a definition of this term would depend upon the facts and circumstances surrounding each case."

Therefore, I believe that a search warrant, based upon probable cause, may issue for the search of a private dwelling seeking prohibited liquors and beverages after six o'clock, p.m., and before eight o'clock, a.m., provided said premises are open. I further believe that, should the premises be closed, a search warrant may still issue for a search of the dwelling provided an affidavit is made by someone stating positively that prohibited liquors and beverages are in the dwelling, and the warrant shows an authorization for execution in the nighttime.

Very truly yours,

JOHN PATTERSON
Attorney General

December 20, 1956

Honorable Melvin Dawkins
Administrator
Alabama Alcoholic Beverage Control Board
CAPITOL

Veterans—Taxation—Licenses—Exemptions.

Veterans' exemptions from license tax discussed generally.

Opinion by Assistant Attorney General Rinehart.

Dear Sir:

Your request for an official opinion, bearing date of October 24, 1956, is as follows:

"Several years ago, we believe while the Korean War was in progress, the question came up as to whether or not we could grant exemptions on licenses issued by the Alabama ABC Board to veterans who were being called back into the armed forces or who remained in the reserves when their tour of active duty was completed.

"We were advised by Col. Millard Westcott over the telephone that your office was of the opinion, and that he had correspondence from your office to such effect, that ,inasmuch as the Legislature specifically stated 'Honorable discharge or other notice of the termination of such service' in the law setting forth veterans exemptions, we could not grant exemptions to reservists. We later received a letter, or copy of a letter, which we presumed was an official opinion of the then Attorney General, confirming our talk with Col. Westcott. We are now unable to locate this letter in our files, not having an approximate date on same.

"We are now advised by receipt of a copy of your letter of September 25, 1956 to the Honorable C. C. Horton that we are in error in requiring an honorable discharge before allowing exemptions from license tax granted by Sections 852 and 864(1); that a certificate evidencing honorable service is all that these Sections require; and that your official opinion of May 22, 1956 in regard to veterans exemptions for Poll Tax and Poll Lists should cover any questions we might have as to use of a certificate of service.

"However, we are not able to clarify our questions exclusively by use of your official opinion in regard to Poll Tax & Poll Lists because this opinion presumes a continuing exemption whereas the exemptions we are permitted to allow are based on a six-year period which must begin with a specific date. We would be very remiss if we did not request further clarification.

"Shall we grant veterans exemptions on licenses beginning with dates of the first transfer of the veteran from an active duty status to a status of inactive duty following the cessation of hostilities? Or shall we use the date of his certificate next preceding the filing of his request for exemptions? Or shall we use the date of his actual honorable discharge or other notice of termination of service?

"If a veteran is allowed exemptions for one or more years, based on a period of active duty during hostilities, and then is recalled to active duty during a period of peace, can we grant exemptions for an additional period to complete his allowance of exemptions for six years, or must we consider that he has lost his rights to this period of time consumed in active service in peacetime.

"In the case of officers, who are usually not discharged until years after a war, shall we use as our base date that first date of inactive status following the dates of hostilities as shown on his service record; that date of inactive service next preceding his claim for veterans exemptions; or his actual discharge?

"Will it be permissible to grant exemptions for a period of one or more years, basing the beginning date on a 'Certificate of Service,' and later complete the veterans six years of exemptions by basing the beginning date on his honorable discharge? We would not like to be the cause of any veteran not being able to receive his full exemption allotments because of our having thus far withheld exemptions pending an honorable discharge or other notice of termination of service.

"We do not fully understand the references in your letter of September 25, 1956 to the Honorable C. C. Horton to Section 852 of Title 51. As far as we know, we are granting exemptions to all of the veterans qualifying as to 25% disability who have claimed such exemptions and who have furnished us with letters from the Veterans Administration or with statements from doctors setting forth 25% or greater disability, provided, of course, that such veterans meet the stated qualifications as to income, property, employees, etc.

"We have on file one request for refund of the amount of allowable exemption as paid, under protest, by a licensee. Will we be permitted to refund the amount of this exemption if you decide that we are to accept the date shown on the applicant's certificate of service instead of on an honorable discharge?

"We regret that, due to the extreme pressure of work, occasioned by our renewal of licenses, we have been delayed most of October in asking for your official opinion as per the above."

Three questions are asked in the fifth paragraph of your request. All three are answered by the terms of Title 51, Section 852, Code of Alabama 1940, as last amended by Act No. 233, General and Local Acts 1953, page 299, and Act No. 353, General Acts 1945, page 570 (Title 51, Section 864(1), 1955 Cumulative Pocket Part, Code of Alabama 1940), as last amended by Act No. 229, General and Local Acts 1953, page 296, as interpreted by an informal opinion of this office, dated September 25, 1956, to Honorable C. C. Horton, State Service Commissioner, Department of Veterans Affairs, a copy of which you have. See also Quarterly Report of Attorney General, Vol. 40, page 54.

To amplify and if possible clarify this opinion to your satisfaction, I state that in the case of a veteran, whether an officer or an enlisted man, who has completed a tour of active duty in the Armed Forces of the United States, a part of which was in time of hostilities with a foreign ocuntry, as

provided for in Sections 852 and 864(1), as amended, supra, either an honorable discharge of a certificate evidencing honorable service is sufficient to entitle an otherwise qualified veteran to an exemption from the Alcoholic Beverage Control Board license tax.

The next question raised by your series of questions is: From what date is the six year period of exemption granted by Section 864(1), as amended, supra, measured? The answer to this question is that the six year period of exemption is measured from the date when the veteran in question is first released from continuous, extended active duty of over ninety days in time of hostilities. This release may, in some cases, be evidenced by a certificate of service and in other cases by an honorable discharge. In either event, it is the date of release from active service which governs. For example, a reservist may receive a certificate of service showing honorable service during the Korean war terminating in June of 1956; he may, however, have an additional four years reserve obligation with the result that he does not receive an honorable discharge upon his release from active duty. In this case the veteran's six year period of exemption commences with the date of his release from active duty and not the day of the honorable discharge, four years subsequent thereto. On the other hand, certain veterans will have, upon their release from active duty, completed all reserve obligations so that coincident with that release from active duty they will receive an honorable discharge. In this case, as it so happens, the date of termination of service and the date of the honorable discharge will coincide and the six year period of exemption should be measured from that date.

The sixth paragraph of your letter reads as follows:

> "If a veteran is allowed exemptions for one or more years, based on a period of active duty during hostilities, and then is recalled to active duty during a period of peace, can we grant exemptions for an additional period to complete his allowance of exemptions for six years, or must we consider that he has lost his rights to this period of time consumed in active service in peacetime."

As I interpret this question, the veteran in the example you give, applied for and obtained an exemption and then at a later time, either voluntarily or involuntarily, returned to active duty in a period of peace. It is my opinion that not only would the veteran in this situation not obtain any additional exemption by reason of his peace time service but that the six year period of exemption would continue to run during his active service in time of peace. As to this case, I refer you to an opinion of this office (Quarterly Report of Attorney General, Vol. 66, page 102), which also holds that a veteran who has served two separate terms of service in the Armed Forces may claim an exemption from business or occupational license taxes for a period of six years after his discharge or termination from service in respect to each period of military service in time of war or hostilities.

The case of officers, referred to in the seventh paragraph of your request, is no different from that of enlisted men and has been answered above in the first paragraph. It should be remembered that an officer does not receive a discharge but is either retired or resigns.

In the eighth paragraph of your letter you ask the following:

"Will it be permissible to grant exemptions for a period of one or more years, basing the beginning date on a 'Certificate of Service,' and later complete the veterans six years of exemptions by basing the beginning date on his honorable discharge? . . ."

It is my opinion that the date of the certificate of service showing completion of active service is the base date from which the six year period of veterans' exemptions should be computed. As was pointed out above, in certain cases this date and the date of honorable discharge would coincide. Let me reiterate that an honorable discharge is only one of the documents evidencing honorable service and that a certificate of service showing such honorable service also satisfies the veteran's exemption statutes.

Your statement that you do not understand the reference to Section 852, as amended, supra, in my letter of September 25, 1956, addressed to Honorable C. C. Horton, may best be answered by suggesting that you read both Mr. Horton's letter to me, dated September 18, 1956, together with the answer to it.

The answer to the final question in your letter, is in the affirmative. It would follow that if, as I have clearly held, a veteran is entitled to an exemption from license tax upon proof of honorable service by a certificate of service, that you should refund the amount of the exemption you have erroneously denied him.

Very truly yours,

JOHN PATTERSON
Attorney General

INDEX

QUARTERLY REPORT OF THE ATTORNEY GENERAL

For the Period From October 1, 1956, Through December 31, 1956

VOLUME 85

—A—

ABSENTEE BALLOTS:

Merchant marines and civilian employees of armed forces may not cast by mail 9

National Guard on active duty may cast by mail 9

ACCOUNTANTS AND ACCOUNTING:

Auditing of municipalities done by same person for successive years? 14

ACTS (GENERAL AND LOCAL):

GENERAL ACTS 1945, AS AMENDED:

Page 570 22

AD VALOREM TAXES:

Motor vehicles—Date of entrance into state controls assessment 11

ASSESSMENTS:

Motor vehicle ad valorem tax—Date of entrance into state controls 11

AUTOMOBILES:

Ad valorem tax—Date of entrance into state controls assessment 11

—C—

CODE OF ALABAMA 1940:

Title 15:
Section 107 19

Title 29:
Section 220 19

Title 37:
Section 445 14

Sections 773 and 778 16

Title 51:

Section 57 11

Section 704 11

Section 852, as amended 22

COUNTIES:

Governing bodies authorized to change election districts—
Subject discussed generally 7

—E—

Precinct or district boundary changes—Discussed generally 7

EXEMPTIONS:

Veteran's license—Discussed generally 22

—I—

INTOXICATING LIQUORS:

Proper search warrant for dwelling house day and night 19

—L—

LICENSES:

Veteran's exemptions—Discussed generally 22

—M—

MILITARY AND NAVAL AFFAIRS:

Absentee ballots—Merchant marines and civilian employees of armed forces may not cast by mail 9

Absentee ballots—National Guard member on active duty may cast by mail 9

MOTOR VEHICLES:

Ad valorem taxes—Date of entrance into state controls assessment 11

MUNICIPALITIES:

Auditing of—Done by same person for successive years? 14

Division into election wards unnecessary 7

Zoning ordinance must be published before passage 16

—O—

OPINIONS OVERRULED, MODIFIED AND DISTINGUISHED:

Volume 59, page 78 7

—P—

PUBLICATIONS:

Of zoning ordinance—Prerequisite to passage 16

—S—

SEARCHES AND SEIZURES:

Proper warrants for search of dwelling house day and night 19

SOLICITORS:

May not issue search warrant on affidavit 19

—T—

TAX ASSESSOR:

Books remain open through last Monday in February 11

TAXATION:

License exemption—Veteran's—Discussed generally 22

Motor vehicle ad valorem taxes—Date of entrance into state controls assessment 11

—V—

VETERANS:

License tax exemptions—Discussed generally 22

VOTERS:

Number in district or precinct unlimited 7

—W—

WARRANTS:

Proper for search dwelling house day and night 19

Search warrant not issued by solicitor on affidavit 19

—Z—

ZONING:

Ordinance must be published before passage 16